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Agonizing Self-Criticism May Embarrass CBS

Westmoreland Wants Jury to See Report

By Eleanor Randolph
 Washington Post Staff Writer

U.S. District Court Judge Pierre N. Leval soon will decide whether news organizations ever again will want to agonize on paper about their employees' mistakes.

The professorial judge in the *Westmoreland v. CBS Inc.* libel case will rule on whether a brutally honest critique by CBS of its own documentary should become a part of the already voluminous court record.

"The Benjamin Report," as it has become known, was CBS's post-broadcast reckoning of how well CBS Reports put together "The Uncounted Enemy: A Vietnam Deception," which is the subject of retired general William C. Westmoreland's \$120 million libel case.

The internal analysis is embarrassing for CBS. It lays out 11 "principal flaws" in the program, a few minor problems and several somewhat embarrassing interviews with the creators of the documentary. The 68-page package was put together by Burton Benjamin, a senior executive producer at CBS Reports.

CBS lawyers are trying to block the report, and Westmoreland's lawyers want the jury to have it.

"I don't know why they need it," CBS lawyer David Boies said recently. "It gave them a road map for this case."

Boies has argued in a memorandum to the judge that if the Benjamin report goes to the jury, "no news organization would ever again engage in such worthwhile self-analysis, criticism and repair."

Boies and other CBS lawyers liken it to cases in the auto industry when efforts by the car manufacturers to change a design were not allowed as evidence that the old model caused an accident. The 2nd

Circuit Court of Appeals ruled in 1982 that "people will be less likely to take subsequent remedial measures if evidence of their repairs or improvements may be used against them in lawsuits"

Westmoreland's lawyer, Dan M. Burt, argued in his memorandum that Boies is trying to "shoehorn" the Benjamin report into a legal loophole that doesn't fit this case.

Burt said the report "is not evidence of a subsequent remedial measure. The Benjamin report is nothing more than a retrospective analysis." He added that CBS used the report in 1982 "to publicly vindicate the broadcast, not to privately redress its deviations"

The program, which has been the subject so far of six weeks of testimony in Manhattan's federal courthouse, charged that Westmoreland and other military officials were part of a "conspiracy" in 1967 to suppress higher enemy troop estimates to maintain support for the war.

Westmoreland's lawyers are arguing that CBS libeled him when it charged that he hid crucial intelligence from his superiors, including President Lyndon B. Johnson, who therefore were surprised by the massive communist assault in South Vietnam beginning on the Tet holiday, Jan. 31, 1968.

Although the documentary on Jan. 23, 1982, was criticized immediately by Westmoreland and others, Benjamin's internal report was ordered in May 1982 by CBS News President Van Gordon Sauter. Sauter wanted the report after an article in TV Guide entitled "Anatomy of a Smear," by Don Kowet and Sally Bedell, charged a series of irregularities in the way producer George Crile and reporter Mike Wallace had put together the show.

Benjamin's report, which took about six weeks to complete, found "an imbalance in presenting the two sides of the issue." He also outlined other criticisms:

■ "A 'conspiracy,' given the accepted definition of the word, was not proved."

■ Crile twice interviewed one friendly subject, former CIA official George Allen, after showing him what others had said—a violation of CBS guidelines.

■ Samuel A. Adams, a codefendant in this case along with Crile and Wallace, was identified on the show as a consultant. Benjamin said he should have been identified as a paid consultant.

■ Producers of the program failed to interview retired Army general Phillip Davidson, who they believed was mortally ill. Davidson would have been available for an interview and testified for Westmoreland during the trial.

■ Two meetings were merged by mistake into one on the program. A telegram from Westmoreland's deputy was identified as being from Westmoreland himself. One subject in the program seemed to be misidentified, or identified in a confusing way.

■ Crile and Wallace failed to take notice of a letter sent to them by Westmoreland after they interviewed him: In the letter, Westmoreland tried to retract his estimates of the North Vietnamese and Viet Cong infiltration in the period before Tet, but his original version was used in the broadcast.

The bottom line for Benjamin, however, was that, although the report violated CBS guidelines, "I think the piece itself is accurate, that it faithfully represented what went on back in 1967 and 1968."

Still, media advocates fear that television editing—like the imperfect techniques of making laws and sausages—may not be something that the average juror will view

kindly when it is spotlighted in the courtroom in coming weeks.

Moreover, there are parts of the Benjamin report that Boies contends are hearsay and "prejudicial" against CBS. One such portion is an interview with producer Crile on how he viewed Westmoreland's role in the documentary and how the general performed in his interview with Wallace.

"Do you think Westmoreland was somewhat inept?" Benjamin asked.

"Yes, he seems stupid," Crile answered.

"Well, if he doesn't come off well, maybe you should have got someone else to defend him," Benjamin said.

"Westmoreland was not the show," Crile responded.

"He came out as the heavy, George," Benjamin replied.

Such brutal self-analysis should be encouraged in a trade that doesn't like criticism, Boies is arguing. If such quotes appear in court, he said, some in the media fear that newspapers and networks may decide to stand by their stories unflinchingly until a jury or a judge rules otherwise.



DAVID BOIES

... would suppress internal analysis